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October 28, 2008

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: *Developing a Unified Intercarrier Compensation Regime*, CC Docket No.
01-92

Dear Ms. Dortch:

The purpose of this letter is to respond to the October 24, 2008 filing in the above-captioned docket by Free Press setting forth a series of recommendations on the draft intercarrier compensation/universal service reform proposal ("Draft Proposal") currently being reviewed by the commissioners.¹ Several of the recommendations suggested by Free Press would fail to cure the harms to competition contained in what we understand to be the Draft Proposal. In addition, it appears that Free Press is proposing modifications to the Draft Proposal that would create additional concerns for the development and maintenance of local facilities-based competition beyond those raised by the Draft Proposal.

As a threshold matter, it bears noting Free Press offers detailed suggestions for modifications to a draft intercarrier compensation/universal service reform order that has not been shared with the public. Free Press admits that it is suggesting changes to a proposal "as we understand it,"² once again demonstrating that interested parties are shooting in the dark at a comprehensive reform plan that has not been made publicly available. As noted by the

¹ Letter from Ben Scott, Policy Director, Free Press, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-337, 06-122, CC Docket Nos. 96-45, 01-92 (filed Oct. 24, 2008) ("*Free Press Ex Parte*").

² *Id.*, at 1.

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undersigned carriers in an earlier filing, the lack of knowledge regarding the specific reforms under consideration by the Commission makes it impossible for interested parties to provide relevant substantive input on issues that could have a tremendous impact on their ability to do business.³ Thus, as urged by a broad group of consumer advocates, state regulators, rural carriers, midsize carriers, wireless companies and competitive providers, the Commission should refrain from adopting any comprehensive reform now and should put out for public comment any proposed rules revising its intercarrier compensation and universal service regimes.⁴ Along those lines, the signatories endorse the suggestion by Free Press that the Commission defer the issue of whether to declare VoIP an information service to a Further Notice of Proposed Rulemaking ("FNPRM").⁵

More substantively, Free Press proposes that the Commission modify the Draft Proposal to "establish a framework that drives terminating access rates lower, but relies on the states to decide the issue of where final rates should land."⁶ Critically, however, the Free Press framework would require "state regulators [to] establish a process where rates would decline in years 1 and 2 to the current interstate level."⁷ The reduction of current intrastate access rates to interstate rate levels over a two year period does not reflect any change from (our understanding of) the Draft Proposal. As the signatories to this letter have previously informed the Commission, the Commission does not have statutory authority to adopt this element of the Draft Proposal.⁸ The Communications Act of 1934, as amended, does not give the Commission the

³ See Letter from 360networks (USA) inc., *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Oct. 13, 2008).

⁴ See *Widespread and Diverse Voices Urge Transparency at the FCC: Public Comment Essential on Intercarrier Compensation and USF Proposals*, Press Release (Oct. 26, 2008). See also Letter from David Certner, Legislative Counsel, AARP, to Kevin Martin, Chairman, Federal Communications Commission, CC Docket Nos. 80-286, 01-92, WC Docket Nos. 04-36, 06-122, 08-152, WT Docket No. 05-194 (filed Oct. 28, 2008); Letter from Orijiakor Isiogu, Chairman, Monica Martinez and Steven Transeth, Commissioners, Michigan Public Service Commission, to Kevin Martin, Chairman, Federal Communications Commission, CC Docket Nos. 80-286, 96-45, 01-92, WC Docket Nos. 04-36, 06-122, 08-152, WT Docket No. 05-194 (filed Oct. 28, 2008); Letter from Judith Williams Jagdmann, Chair, Virginia State Corporation Commission, to Kevin Martin, Chairman, Federal Communications Commission, CC Docket Nos. 80-286, 96-45, 01-92, WC Docket Nos. 04-36, 06-122, 08-152, WT Docket No. 05-194 (filed Oct. 28, 2008).

⁵ *Free Press Ex Parte*, at 15.

⁶ *Id.*, at 5.

⁷ *Id.*

⁸ See Letter from Brad Mutschelknaus, Counsel to Broadview Networks, Inc., *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Oct. 23, 2008) ("*Oct. 23rd Ex Parte*").

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authority to supersede state commission regulation of intrastate access services. Even if the Commission did have the legal authority to supplant state commission rate-setting for intrastate access services (which it does not), the reduction of intrastate access rates to interstate rate levels over two years would cause extremely harmful “rate shock” to competitive carriers, thereby skewing the competitive landscape.⁹ Moreover, the requirement that intrastate access rates be virtually flash-cut to interstate rate levels assumes that the intrastate access rates for local carriers that have been set by the state commissions are not based on costs. Yet neither Free Press nor any other interested party has provided any evidence that this is in fact the case.

The Draft Proposal/Free Press recommendation that intrastate access services be reduced to interstate rate levels over two years is especially problematic when considered in combination with Free Press’s proposal that the Commission “revisit” the issue of whether increases in federal subscriber line charge (“SLC”) caps should be adopted “prior to implementing any SLC increases.”¹⁰ Competitive local exchange carriers (“CLECs”), as a group, currently derive approximately six percent of their total annual revenue – and a significantly higher percentage of their free cash flow – from intercarrier compensation.¹¹ Forcing intrastate access rates down to interstate rate levels within two years would have an immediate significant negative impact on this important revenue source. If CLECs are precluded for any period of time from increasing SLCs to recoup at least a portion of these losses, the results could be catastrophic for the competitive industry.¹²

Free Press proposes that “States should have the flexibility to decide whether the final *cost-based* reciprocal compensation rate should be uniform access all carriers, or if it is economically appropriate to have some level of variation.”¹³ The signatories agree with Free

⁹ The signatories have suggested that if the Commission does decide to adopt the requirement that intrastate access rates move to interstate rate levels, the Commission should adopt a transition period of at least five years, especially given today’s economic climate. See Attachment to Letter from Genevieve Morelli, Counsel to Broadview Networks, Inc., *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 01-92 (filed Oct. 27, 2008).

¹⁰ *Free Press Ex Parte*, at 6, 14.

¹¹ See Letter from Brad Mutschelknaus, Counsel to Broadview Networks, Inc., *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Oct. 28, 2008) (“Oct. 28th Ex Parte”), at 2.

¹² Importantly, although SLC increases may enable CLECs to recoup some access revenue losses from end users, CLECs lack the pricing power to sustain CLEC increases to recoup much of the loss.

¹³ *Free Press Ex Parte*, at 14 (emphasis supplied).

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Press that the permanent intercarrier compensation rates paid by carriers should be cost-based.¹⁴ Free Press is silent, however, on the specifics of a cost-based pricing methodology. The signatories reiterate their previously-stated position that the current TELRIC methodology used by the states to set reciprocal compensation rates should be maintained.¹⁵ Adoption of a short-run marginal cost methodology (as some have suggested) would prevent CLECs from recovering their costs of providing terminating access services.¹⁶ Even if the states would not immediately set rates based on that methodology, the adoption of that methodology would send a strong signal to the financial community that would harm CLECs' ability to raise capital.

Sincerely,



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¹⁴ See Letter from Ben Scott, Policy Director, Free Press, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-337, 06-122, CC Docket Nos. 96-45, 01-92 (filed Oct. 13, 2008) ("*Free Press Oct. 13th Ex Parte*"), at 2.

¹⁵ See Attachment to Letter from Genevieve Morelli, Counsel to Broadview Networks, Inc., et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 01-92 (filed Oct. 27, 2008). See also Oct. 28th Ex Parte;

¹⁶ See Letter from John Heitmann, Counsel to NuVox, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, WC Docket No. 04-36 (filed Oct. 2, 2008) ("*NuVox Ex Parte*").